UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

INDIAN RIVER MEMORIAL HOSPITAL

and

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 769, AFL-CIO

Cases 12-CA-23231
12-CA-23251
12-CA-23433
12-CA-23457

Chris C. Zerby, Esq., for the General Counsel.
Helen A. Palladeno, Esq., and Grant D. Peterson, Esq. for the Respondent.
Steve Myers, Business Representative, for the Charging Party.

DECISION

Statement of the Case

MICHAEL A. MARCIONESE, Administrative Law Judge. I heard this case in Vero Beach, Florida on March 29 and 30, 2004. International Brotherhood of Teamsters, Local 769, AFL-CIO ("the Union") filed the charges in Case Nos. 12-CA-23231 and 12-CA-23251 on July 25, 2003 and August 4, 2003, respectively.[1] Both charges were amended on December 17. The Union filed the charge in Case No. 12-CA-23433 on September 25 and the charge in Case No. 12-CA-23457 on October 9. An order consolidating cases, consolidated complaint and notice of hearing issued on January 30, 2004, alleging that Indian River Memorial Hospital, the Respondent, violated Section 8(a)(1) and (5) of the Act. On March 15, 2004, the General Counsel amended the consolidated complaint.

The complaint, as amended, alleges that the Respondent, through two of its supervisors, made statements that independently violated Section 8(a)(1) of the Act on May 21, including statements that created the impression of surveillance, encouraged employees to file a decertification petition, and suggested that the Respondent was transferring employees and creating new positions to increase the number of anti-union employees in the bargaining unit represented by the Union. The complaint further alleges that the Respondent violated Section 8(a)(5) and (1) of the Act on May 21 by announcing the transfer of team leaders and biomedical technicians into the bargaining unit, thereby altering the scope of the recognized bargaining unit unilaterally and without the Union's consent. The complaint alleges further that the Respondent violated Section 8(a)(5) and (1) of the Act, in May and June, by unilaterally assigning bargaining unit work to the non-unit team leaders and biomedical technicians, and on July 25 by unilaterally

[1] All dates are in 2003 unless otherwise indicated.

requiring employees to be on-call during the week and then by dealing directly with unit employees in rescinding the on-call requirement. Finally, the complaint alleges that the Respondent violated Section 8(a)(1) of the Act on September 12 by assisting employees involved in an effort to decertify the Union when it permitted a group of employees to leave work en masse to pursue their efforts.

On February 12, 2004, the Respondent filed its answer to the consolidated complaint and, on March 25, 2004, an answer to the amendment to the complaint. The Respondent denied the unfair labor practice allegations and raised certain affirmative defenses. Specifically, the Respondent asserted that it had acted in the "good faith belief" that its actions were lawful, that it was required by the Act to transfer the employees at issue into the unit, that the alleged direct dealing involved communications with unit employees that were protected by Section 8(c) of the Act, and that the direct dealing allegation was not supported by a timely-filed charge as required by Section 10(b) of the Act.[2]

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the Respondent and the General Counsel, I make the following

Findings of Fact

I. Jurisdiction

The Respondent, a corporation, operates a hospital at its facility in Vero Beach, Florida, where it annually derives gross revenues in excess of $250,000 and purchases and receives goods valued in excess of $50,000 directly from points outside the State of Florida. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. *Background*

The employees involved in the instant dispute work in the Respondent's Facility Services Department, which consists of engineering employees and environmental services (housekeeping) employees. Clifford Schroeder III is the Respondent's Director of Facility Services in charge of this department. Robert Michael is the Manager of Facilities Services in charge of the engineering employees in the department. Until June 2002, the Respondent contracted with Aeromark/ServiceMaster to run this department. Schroeder was an employee of Aeromark at the time. In June 2002, the Respondent terminated its contract with Aeromark and took the facility services operation in-house, hiring Schroeder to continue as the director. Michael became a manger in 2001. Before that, he had been a team leader. Robert Zomok[3] has

[2] The Respondent has not pursued the Section 10(b) defense as it relates to the direct dealing allegation. I note that the amended charge filed in Case No. 12-CA-23251 on December 17 does specifically allege direct dealing in connection with the on-call issue. This amended charge was filed within the six-months' statute of limitations in Section 10(b) of the Act. Accordingly, I find no merit to this affirmative defense.

[3] Zomok's name appears incorrectly at several places in the transcript as "Zook". I shall hereby correct the transcript accordingly.

served for a number of years as the Respondent's Director of Human Resources and, along with the Respondent's counsel Grant Peterson, represented the Respondent in contract negotiations with the Union.

The Engineering Department consists of craftsmen, journeymen and master craftsmen in various trades, such as electrician, plumber, and HVAC technician, who provide skilled maintenance services throughout the hospital, and biomedical equipment technicians (BMETs) who perform preventative maintenance and repairs on biomedical equipment used in the direct care of patients. Because of the nature of biomedical equipment, the Respondent is required to maintain detailed records documenting its maintenance of the equipment. The evidence in the record indicates that the BMETs report to different areas to receive their work assignments, wear different uniforms and are in different pay grades than the skilled maintenance employees. At the time of the hearing, Michael, as the facilities manager, supervised ten (10) skilled maintenance employees and four (4) BMETs.

On August 9, 2000, the Respondent voluntarily recognized the Union following a card check by a neutral third party. The Respondent and the Union agreed that the bargaining unit would be defined as follows:

> All Stationary Engineers, Journeymen, Master Craftsmen, Craftsmen and Groundskeepers, excluding Team Leaders, Senior Groundskeepers, CAD Operators, Engineering Data Management Coordinator, Biomedical Equipment Technician I, II and III, Office Coordinator, and all other employees, guards and supervisors as defined by the Act.

At that time, there were about 22 employees in the bargaining unit. Although the parties commenced negotiations for their first contract within a few months of recognition, they had not reached agreement on a collective-bargaining agreement by the time of the hearing, almost four years later.[4]

This is not the first unfair labor practice proceeding involving these parties. On September 30, 2003, the Board issued a Decision and Order finding that the Respondent violated Section 8(a)(5) and (1) of the Act, in October 2000, when it unilaterally eliminated on-call pay except for the weekends and instituted new second and third shifts. *Indian River Memorial Hospital, Inc.,* 340 NLRB No. 58 (Sept. 30, 2003). The Board ordered the Respondent, inter alia, to cease and desist from unilaterally instituting changes in its unit employees' wages and hours and other terms and conditions of employment without providing the Union with notice and an opportunity to bargain about these changes and to restore the status quo ante by reinstating the shift schedules and on-call pay procedures as they existed before the unlawful unilateral changes. The General Counsel does not claim in this proceeding that the Respondent has not complied with the Board's order.

In June 2002, in order to address significant operating losses, the Respondent had a reduction in force affecting a number of positions throughout the hospital. Zomok testified that the Respondent laid off 52 employees as part of this reduction in force. The Engineering staff was particularly hard-hit, with the unit being reduced from 22 to 11 employees. The Respondent also laid off one BMET II. In addition, as part of its cost-savings plan, the Respondent terminated a number of outside contractors that had been performing maintenance on

[4] The Union also represents a separate unit of Registered Nurses at the hospital that is not involved in this proceeding.

biomedical equipment. According to Zomok, its June 2002 cost-reduction efforts did not completely resolve the Respondent's financial problems and further reductions, affecting other departments, have occurred since then. Zomok testified that the Respondent's total number of full-time equivalent (FTE) positions is down by almost 100 from a year ago. Zomok also testified that, as part of its cost-reduction plan, the Respondent carefully assesses the need to fill positions as they become open. As a result, many requisitions submitted by departments throughout the hospital to fill positions or hire new employees are on hold.

B. *Alleged Change in Scope of Unit and Related Section 8(a)(1) Allegations*

1. The Evidence

In early 2003, the Respondent employed eleven employees in the unit, three non-unit team leaders and five non-unit BMETs. All of these employees were under Michael's supervision. On April 3, Zomok sent the following e-mail to the Union's negotiators, Steve Myers and Mike Scott:

> Based on our reorganization and having our Team Leaders do more and more bargaining unit work, we are going to change the three (3) people involved back to titles that would fall under the recognition petition. We also propose to maintain their current pay rates pending completing the agreement.
>
> Obviously, this presents some complications especially in the area of their current status relative to both welfare and pension benefits. The effective date of this transition will be 4/6/03.
>
> In addition, we will be moving a person from biomed back into a bargaining unit position as well. We also propose maintaining his current pay rate. We have yet to determine an effective date for this move.
>
> Please let me know if you have any questions.

Scott responded by e-mail, the same morning, advising Zomok that the Union wanted to "talk more about this when we meet for negotiations next week."

The parties met on April 11. Zomok and Peterson represented the Respondent and Business Representatives Scott and Myers, with employees Barry Hurley and Mark Cheek, represented the Union. According to Myers, who was in transition to replace Scott as the Union's spokesman at the time, attorney Peterson raised the subject of Zomok's e-mail at this meeting.[5] Myers testified that Peterson said the parties were close to agreement on their first contract, that they were down to discussing economics, and the Respondent didn't want to start off with a grievance over the employees identified in Zomok's e-mail doing unit work since they were already doing unit work. Peterson proposed bringing the three team leaders and the one BMET into the unit while negotiations were in progress. After a caucus, Scott responded by telling the Respondent that now was not a good time to add people to the unit. Scott offered to defer discussion of how these individuals would be "bumped" into the unit until after a contract was ratified. Myers recalled that Scott may have raised the issue of seniority of these employees vis-à-vis employees who were already in the unit, expressing the position that they

[5] Scott did not testify at the hearing in this proceeding.

would be the junior employees under the contract when it went into effect. Hurley also testified for the General Counsel about this meeting. He recalled Peterson telling the Union that the Respondent was overstaffed in the biomed area and wanted to transfer one employee into the unit. According to Hurley, Scott told the Respondent that, if the Respondent put these people in the unit, "we'd be looking at a decert [petition]."

Zomok testified about this meeting for the Respondent, relying upon his handwritten notes. According to Zomok, the parties' discussion of the issue raised by his e-mail focused on "when", not "if", these individuals would go into the unit. While the Respondent wanted the change to take place immediately, the Union proposed waiting until after a contract was ratified to add the employees to the unit. Zomok also recalled that the parties discussed pension issues related to transferring the non-unit employees into the unit. Zomok's cryptic notes contain the following phrases putatively documenting this discussion:

> Recognition
> Team Leader
> Seniority – "date into unit" for team leaders
> Concern – getting a deal "closed" – (union)
> Suggest – become effective upon ratification
>
> Issue the 45 day notice to maint. Unit for
> pension freezing ([indecipherable note] 4-11-03)

The parties did not meet again until May 21. The Respondent took no action in the interim to change the status of the team leaders and the BMET. Zomok and Peterson again represented the Respondent. Myers was the sole official from the Union at this meeting. He was joined by employees Hurley, Cheek and Mike Murray. There is no dispute that the Union submitted its first economic proposal at this meeting. It is also undisputed that Peterson handed the Union a letter, dated May 21, laying out the Respondent's position regarding inclusion of the team leaders and BMET in the unit. In the first paragraph of the letter, Peterson summarizes the discussion that occurred at the last meeting as follows:

> During the last bargaining session, Bob and I indicated that the Team Leaders and a Biomedical Equipment Technician needed to be placed in the bargaining unit because they are now performing bargaining unit work as a result of the reductions made in the Maintenance area. You suggested that the employees be placed in the bargaining unit after the collective-bargaining agreement has been ratified by the current bargaining unit members. We then indicated that we would need to review the legal implications of failing to place employees into the unit prior to the ratification of the contract. As we suspected, the employees need to be placed in the bargaining unit during negotiations and prior to ratification because both the Hospital and Union will be subject to potential legal liability if they are placed in the unit after ratification.

Peterson, in his letter, then undertakes a review of the law regarding a union's duty of fair representation in the context of contract ratification, citing several cases. Peterson's letter claimed that the Union would breach its duty of fair representation if it "arbitrarily" deprived members of the unit the right to information and a vote on the agreement setting forth their terms and conditions of employment and that the Respondent risked liability if it "acquiesced" in the Union's failure to fairly represent unit employees. Peterson concluded this legal analysis by advising the Union:

> Based on the foregoing, the Hospital believes that the Team Leaders and Biomedical Equipment technician need to be placed in the bargaining unit during negotiations and prior to contract ratification to avoid legal liability as it is clear that they are currently bargaining unit members by virtue of performing bargaining unit work. Consequently, effective May 21, 2003, the Hospital has transferred the Team Leaders and a Biomedical Equipment Technician into the bargaining unit into the appropriate job titles.
>
> If you have any questions, please feel free to contact me.

According to Myers, after reviewing this letter, he told Zomok and Peterson that he needed to consult with the Union's legal counsel before responding to this letter. When the parties met again, two days later, Peterson asked Myers if he had spoken to counsel yet. Myers replied that he had not had time. According to Myers, he then raised whether it was appropriate to bump these 3 or 4 employees into unit positions when the Respondent had a lay-off eight months before and unit employees were awaiting recall. Myers told the Respondent that the laid off employees should have the first right to the jobs that the team leaders and BMET bumped into. Myers again proposed that the parties wait until after they finished negotiations before adding employees to the unit. Myers testified that he also disputed statements in Peterson's letter that the BMET was doing unit work. Myers told the Respondent that, according to reports from unit employees, the BMET wasn't doing any unit work. Peterson responded that he may have made a mistake by including the BMET in the letter but that the problem could be corrected by posting a job in the unit and having the employee bid on it. Myers testified that he never agreed to the inclusion of the three team leaders and the BMET in the unit.

Zomok's testimony, again reading from his cryptic handwritten notes, corroborates Myers in some respects. According to Zomok, it was the Union that brought up the team leader issue at the May 23 meeting, with Myers proposing that bargaining unit seniority start with recognition. Again, Zomok claimed that the discussion was not about "whether" these employees would be placed in the unit but "when". Zomok recalled that there was also discussion about the BMET not performing unit work, with the Union claiming there were additional duties. Zomok testified that this was in reference to a job posting for a new craftsman position.[6] Zomok's handwritten notes reflect no discussion of the issue on May 21 and the following regarding what transpired on May 23:

> Union's turn –
> Team Leaders – concernt (sic) – Bargaining Unit Seniority
> Starts as of date of recognition
> Biomed – after negotiation – not performing work now
> - additional duties.

The parties did not meet again for negotiations until June 4. By that date, the Respondent had transferred two of the three team leaders and one BMET into unit positions.[7] Myers testified that Peterson again raised the subject, asking if Myers had discussed the issue with the Union's attorney. Myers replied that he had, but that the Union hadn't decided how they were going to proceed. According to Myers, he was surprised by Peterson's question because Myers believed, based on the wording of Peterson's May 21 letter, that the Respondent had

[6] The evidence regarding this particular posting will be discussed later in this decision.

[7] The Respondent's actions in this regard will be discussed in more detail later in this decision.

already implemented the change. Myers asked Peterson why he was asking about this when he had already told the Union the Respondent was going to bump these individuals into the unit. According to Myers, Peterson replied that the Respondent was waiting to see if the Union was going to file a unfair labor practice charge before placing them in the unit.

Zomok's testimony regarding the June 4 meeting, also based on his handwritten notes, confirms that Peterson asked Myers if the Union's attorney had reviewed his May 21 letter yet. In his testimony, Zomok did not say what, if any, response the Union gave to this question. Instead, reading from his notes, Zomok testified that the parties then "tentatively agreed to provisions to be in effect for recall" and continued discussing the economic proposals on the table. He did not testify to any further discussion of the subject at this meeting. The Respondent's contract proposal, submitted to the Union at the May 21 meeting, establishes that the parties had in fact reached tentative agreement on the lay-off and recall provision on July 23, 2002, long before the June 4 meeting. The reference in Zomok's notes of the June 4 meeting, upon which Zomok based his testimony, appears as follows:

> Team Leader – Biomed –
> - Stan – T/A provision to be in effect for recall (policy 13-120)

According to Zomok, "Stan" is a reference to the Union's attorney. Although Zomok's notes are cryptic, I do not believe this reference is to a new tentative agreement on recall being reached at the June 4 meeting. Rather, it appears to be a reference to the Union's attorney responding to the May 21 letter by claiming the tentative agreement reached on recall should be in effect and govern the issue of bumping into unit positions. This is consistent with Myers' testimony that the Union had taken that position in response to the Respondent's proposal to place the team leaders and BMET into unit positions.

The initial unfair labor practice charge in this case, filed on July 25, was signed by Myers on July 18 and alleges, inter alia, that the transfer of "supervisory and non-bargaining unit employees into the bargaining unit" violated Section 8(a)(1) and (5) of the Act. Although the parties have continued to meet for negotiations, no evidence was offered regarding any further discussion of the unit placement issue. Zomok did concede, on cross-examination, that the Union has not yet agreed to the transfer of employees into the unit.

The Respondent created the position of Team Leader in 1999, before recognition of the Union. Team Leaders were either a journeyman or master craftsman in their respective trade with additional administrative tasks. The additional duties, at least before the June 2002 reduction in force, involved assigning work to the craftsmen, journeymen, or master craftsmen on their respective teams, ordering supplies and signing for deliveries, facilitating scheduling of vacation and time off, coordinating the work of employees on their team, training and other essentially routine direction of employees. Team Leaders received an extra $1/hour as compensation for these extra duties. The Team Leaders reported to Michael, who had been promoted from the Team Leader position. There is no dispute that the Team Leaders had always done bargaining unit work as well as these additional duties. According to Hurley, a witness for the General Counsel, team leaders spent an average of an hour to an hour and a half performing team leader duties and the rest of the time doing unit work.

Schroeder testified that he made the decision, after consultation with Zomok and Michael, to eliminate the Team Leader position. According to Schroeder, the Respondent no longer had a need for this extra level of supervision after the number of unit employees was cut in half in the June 2002 workforce reduction. Schroeder testified that, in some cases, a team leader was left without a team to supervise. Schroeder testified further that, although the

elimination of Team Leaders was under discussion during the June 2002 workforce reductions, the Respondent "just never got around to doing it", until Spring 2003. Michael also testified that the Team Leaders were no longer doing team leader duties after June 2002. According to Michael, he took over responsibility for handing out work assignments and ordering supplies, After June 2002, anyone in the department could sign for deliveries. Because there were only about 15 employees left in the department, Michael was able to directly supervise the employees. Michael recalled that the decision to eliminate this position was made in early 2003. Zomok also testified that the formal decision to eliminate the Team Leader position was made in early 2003. According to Zomok, the decision was made after he determined that the Team Leaders were doing almost exclusively unit work. According to Zomok, he sent the April 3 e-mail to the Union after consulting with the Respondent's attorneys regarding the subject.

At the time the decision was made, the Respondent employed three Team Leaders in the Facilities Services Department, one of whom was currently out on a work-related injury claim. Zomok testified that he knew that this employee, Walter Smith, was going to retire at the end of May and would not be returning to work. The other two Team Leaders were Wade Boehm, who was a master craftsman electrician who succeeded Michael as Team Leader in 2001, and Don Sewell, a journeyman HVAC technician/team leader. Boehm and Sewell held unit positions when the Union was recognized. Personnel Action Request forms in evidence show that Boehm and Sewell were "demoted" from master craftsman/team leader and journeyman/team leader to master craftsman and journeyman, respectively, effective with the pay period beginning June 1. These forms, which are dated June 5, also indicate that there would be no change in their rate of pay for 90 days. According to Zomok, this was consistent with hospital policy applicable to "involuntary demotions". Pursuant to that policy, at the end of 90 days, the employees' rate would change to the top level of the pay grade for the new position. According to the Respondent's witnesses, Boehm and Sewell continued doing the same type of bargaining unit work after they were re-classified from Team Leader. There is no evidence that they performed any team leader duties after June 1.[8]

Prior to June 2002, the Respondent employed six BMETs, four who were in the most skilled classification of BMET III, one BMET II and one BMET I. Schroeder testified, with corroboration from Zomok, that the Respondent's executive committee initially wanted to reduce the number of BMETs to four. Schroeder was able to convince them to lay-off only one BMET because of concern over the department's ability to handle extra work resulting from the concurrent termination of several contracts with vendors who were performing maintenance on some biomedical equipment. According to Schroeder, the BMET II was laid off and the BMET I, Terry Wilbun, was retained. Wilbun had only recently been promoted from a craftsman to a BMET, on January 7, 2002, and his probationary evaluation had been completed on May 29, 2002 and was generally favorable. Zomok explained that the Respondent decided to lay-off the BMET II instead of Wilbun in June 2002 because Wilbun had more hospital seniority.

Schroeder testified that, in Spring 2003, he decided to eliminate the BMET I position held by Wilbun because he was now satisfied that the remaining four BMET III s could handle

[8] Michael Murray, a master craftsman electrician who testified for the General Counsel, testified at one point that the Team Leader position was not eliminated until shortly before Murray resigned in October. However, he later testified that they lost their titles in July or August. He confirmed that, once they lost the Team Leader titles, the former team leaders were "no longer allowed to tell us what to do." Because Murray's memory as to the timing of this change is foggy, I cannot rely on his testimony as proof that the Team Leaders were directing other employees after the formal change in classification on June 1.

all the work in the department. Schroeder also claimed that Wilbun had not met his goals of advancing his skills as a BMET I since his promotion. Wilbun's January 31, 2003 performance evaluation confirms that the Respondent had some concerns about this. Zomok corroborated Schroeder's testimony regarding the decision to eliminate the BMET I position in Spring 2003. Coincidentally, a craftsman position in the unit was posted on May 21, about the same time that Wilbun's BMET I position was being eliminated. This posting was unusual in that it included additional specialized experience in the maintenance and repair of sterilizers and other biomedical equipment that Wilbun had been performing. As to be expected, Wilbun was the only employee to bid on this job and he was given the job effective June 2. The Personnel Action Request Form indicates this was a transfer and that Wilbun was to retain his current, higher, rate of pay "per policy for involuntary transfer." A Position Requisition form submitted by Michael to the Human Resources Department on May 21, which preceded Wilbun's "transfer", indicated that the purpose of the requisition was "to change grade or job description of a position."[9] Under comments, Michael wrote "BMET #1 Position eliminated, Craftsman position created." Someone in the Human Resource Department wrote "DNP" in the space for "Date posted" and identified Terry Wilbun as the "new hire/transfer". Michael testified that the additional duties he included in the May 21 job posting were "craftsman" duties that Wilbun had always performed, before and after his January 2002 promotion to BMET I. Michael also testified that Schroeder wanted such "low-tech" work done in the craft department, rather than the Biomed shop, because it historically was "craft work".

It is undisputed that, while the parties were discussing the Team Leader and BMET issue at the bargaining table on May 21, Schroeder and Michael were meeting with Wilbun about the elimination of his job. Statements allegedly made by Schroeder at this meeting are the basis for the independent Section 8(a)(1) allegations in the complaint. Wilbun, a 20-year employee of the Respondent who resigned on September 1, testified on behalf of the General Counsel regarding this meeting. His testimony was contradicted by the Respondent's witnesses, Schroeder and Michael, who were the only other people in the room. Thus, credibility is critical to resolving these allegations. A determination as to what was said in this meeting will also impact resolution of the Section 8(a)(5) allegations involving the Respondent's actions regarding the Team Leaders and BMET.

Wilbun testified that, on May 21 while working in the physical therapy area, he was paged by Michael to come to the office. When he got to the office, Schroeder and Michael were there. According to Wilbun, Schroeder opened the meeting by telling Wilbun that a new position had been created for him and that his Biomed position was being eliminated.[10] Schroeder went on to say that they were putting Wilbun back into the bargaining unit to protect his employment as well as to increase the number of anti-union people, or people that didn't want the Union, in the unit. Wilbun testified that he then brought up the subject of Wade Boehm also being an anti-Union person. In response, Schroeder and Michael brought up the names of other employees, including Bill Downam and Chad Lane that they knew to be anti-union. Wilbun testified that Schroeder also told him that, after about a year, Wilbun would go back to being a Biomed Tech I. Wilbun recalled that Schroeder also expressed the opinion that the hospital was too small to have a union. On further questioning by the General Counsel, Wilbun recalled that Michael asked him to write his own job description for a craftsman position because Michael wanted to

[9] Although the form states that a job content survey form and job description must be attached to such a requisition, no such attachment is part of the document in evidence.

[10] In his pre-trial affidavit, Wilbun stated that Schroeder told him that the new position was created for him "because of union issues."

keep Hurley from applying for the new 7:30 to 4:00 PM slot.[11] When shown the May 21 craftsman job posting, Wilbun identified the additional duties related to sterilizing equipment as the portion that he drafted for Michael. In response to another question from the General Counsel, Wilbun recalled that Schroeder asked him to call the NLRB and find out how to decertify the Union and to get as many people to go against the Union as he could. Wilbun denied, on cross-examination, that he was the one who asked Schroeder how to go about decertifying the Union. According to Wilbun, Schroeder did most of the talking during this meeting and Wilbun said very little.

On re-direct examination, Wilbun identified a handwritten document as notes he made of this meeting "directly after the meeting." The notes are consistent with his testimony. However, his testimony regarding when he wrote these notes was contradicted by the affidavit he gave to the Board's investigator on September 18. In the affidavit, Wilbun stated that he made the notes the same week he gave his two-weeks' notice to Zomok. The evidence established that Wilbun gave Zomok his notice on August 18, almost three months after his meeting with Schroeder and Michael. When confronted with this discrepancy, Wilbun insisted that his testimony at the hearing, i.e. that he wrote the notes directly after the meeting, was correct. He surmised that the Board agent drafting his affidavit made a mistake which he did not pick up when he reviewed the affidavit before signing it. Wilbun gave his notes to Mike Murray, a unit employee on the Union's negotiating committee, during his last week of employment.

Wilbun testified that he resigned from the hospital, after 20 years, when he learned that a digital camera containing pornographic pictures of a manager and two women had been found on Schroeder's desk. Wilbun believed that Schroeder had been involved either in creating or disseminating the images. According to Wilbun, he could not work with someone he considered a pervert. Wilbun testified that he also resigned, in part, over the demotion from the BMET I position he felt he had earned by working as a project coordinator for a year before his promotion. Wilbun denied that he harbored any bitterness or bad feelings toward the Respondent that would affect his testimony.

Schroeder and Michael admitted meeting with Wilbun in the April-May period to inform him that his BMET job was being eliminated and that he was being transferred back into the unit. Schroeder and Michael each denied, in response to a series of leading questions, that the allegedly unlawful statements recounted by Wilbun were made. In denying that he told Wilbun that the Respondent needed more anti-union people in the unit, Schroeder testified, gratuitously, "I think we already have enough of them there." Moments later, when the General Counsel asked about this comment, Schroeder at first denied ever saying that, then claimed that the statement was made "in jest". Schroeder also denied being able to name the anti-union employees in the unit, but then testified regarding "the parade of anti-union people in here", a reference to the employees who had been called as witnesses by the Respondent.

Schroeder, during questioning by the General Counsel, at first denied discussing decertification of the union during this meeting. When confronted with his pre-trial affidavit, in which he stated that he told Wilbun that he didn't want Wilbun to pursue decertifying the Union, Schroeder claimed this occurred at a different meeting. According to Schroeder, at a later meeting, in response to Wilbun's statement that he wanted to decertify the Union, Schroeder told him that he would prefer that Wilbun not do that because he didn't want it to appear that was why Wilbun was being removed from the Biomed job. At another point in his testimony, when Schroeder denied telling Wilbun to call the NLRB to find out how to get rid of the Union,

[11] At the time, Hurley was working a later shift, starting at 11:00 AM.

Schroeder testified that he "wouldn't have known that would have been the step." Schroeder's claimed ignorance of the process is suspect in light of his earlier testimony regarding the experience and training he had in dealing with unions and labor relations generally. In contrast to Schroeder's testimony, Michael testified that the subject of union decertification did not come up at the meeting he attended with Schroeder and Wilbun. When pushed by the General Counsel, Michael wavered, claiming he did not recall the subject being initiated by him. Michael did admit to being aware that Wilbun was "very anti-union."[12]

Although Michael testified that Wilbun told him, when he resigned, that he was angry at Schroeder and Michael over being demoted from the BMET I position, Zomok corroborated Wilbun's testimony that the pornography incident was the reason given when Wilbun submitted his two-weeks' notice. As it turned out, after an investigation, Schroeder had no involvement in this incident, other than to retrieve the offending camera and turn it over to Zomok for action. At the time of Wilbun's resignation, the investigation had not been completed and Zomok admittedly made no effort to disabuse Wilbun of his mistaken belief regarding Schroeder's conduct.

The record establishes that Wilbun became a BMET I on January 7, 2002, receiving a $.70/hour increase with the promotion. Immediately before this promotion, Wilbun had been working as a project manager overseeing several construction projects at the hospital. In January 2003, during his first annual evaluation after the promotion, he received another raise despite some reservations expressed by Michael and Schroeder regarding Wilbun's failure to take courses or otherwise advance his knowledge of the job. Wilbun testified, with some corroboration from witnesses for the Respondent and the General counsel, that his job duties were the same before and after his promotion to the non-unit BMET position.[13] Wilbun's specialty had always been sterilizers and he continued to work on the sterilizers until he left the Respondent's employ on September 1. Although he acknowledged being assigned traditional unit maintenance duties after his transfer or demotion back to the unit on June 1, he claimed that he generally ignored these assignments with impunity, focusing his efforts instead on performing work on the sterilizers. In addition, he continued to wear scrubs, the uniform of the BMETs and continued to report to the BMET shop, rather than the craft shop when he came to work in the morning. Work order records maintained by the Respondent show that Wilbun was assigned to work primarily on equipment classified as "biomedical" or "clinical" during the period June 1 to September 1. Wilbun's assignments, at least as reflected on these records, are similar to assignments given to the remaining BMETs and differ from assignments given to the unit maintenance employees. The latter assignments are typically classified as "utility", "trades", "plumbing", etc.

2. Analysis & Conclusion

The General Counsel alleges, and the Respondent denies, that Schroeder and Michael made several statements during their meeting with Wilbun, on or about May 21, that violated Section 8(a)(1) of the Act. As previously noted, resolution of these allegations turns almost exclusively on credibility. The above-described testimony of all three witnesses leads me to believe that none of the witnesses was being completely candid and forthright. As is often the case, the truth of what was said at this meeting may never be known. For example, the glaring inconsistency between Wilbun's testimony and his affidavit regarding when he prepared the

[12] Zomok also acknowledged being aware of Wilbun's anti-union feelings.

[13] It is not clear to me that Wilbun was working on the sterilizers during the time he served as a project coordinator.

notes of the May 21 meeting casts doubt on his overall credibility. His effort to blame the Board agent taking the affidavit was not persuasive. How would the Board agent have come up with the statement that he prepared these notes the same week he handed in his two-weeks' notice had Wilbun not said this? Where else would the Board agent have come up with that date? Moreover, if such a statement were inaccurate, even a casual reading of the affidavit by the individual who wrote the notes should have picked up the mistake. I am forced to conclude that Wilbun prepared the "notes" of the meeting at the time he decided to resign his employment and not "directly after" the meeting. That being the case, his recollection of what transpired at the meeting may have been colored by his feelings toward the "pervert" Schroeder whose activities essentially caused Wilbun to resign. Wilbun's acknowledgement that he also harbored some bad feelings about losing a BMET job he felt he deserved may also have colored his recollection of the events. Thus, there are ample reasons to doubt the veracity of Wilbun's testimony regarding the meeting.

At the same time, Schroeder's denials are not entirely convincing. He was forced to contradict himself on the stand several times when confronted with previous inconsistent statements. For example, his denial that the subject of union decertification was discussed with Wilbun was inconsistent with his affidavit. Schroeder was forced to admit that the subject was discussed, which tends to support Wilbun's testimony. Schroeder's claim that he would not have suggested that Wilbun call the NLRB because he was not familiar with the process is unbelievable. Based on his training and years of experience managing unionized employees, Schroeder clearly would have known that the NLRB was the proper source of information regarding union decertification. Schroeder did admit telling Wilbun that he would prefer that Wilbun not get involved in decertifying the Union because he didn't want it to look like the Respondent had given Wilbun the craftsman job for that purpose. Significantly, despite Wilbun's alleged interest in decertifying the Union, he was not the one who called the NLRB or circulated and filed the petition. This suggests that Wilbun heeded Schroeder's advice. In addition, Schroeder's testimony reveals that he was in fact concerned with the perception of Wilbun's transfer by others. Similarly, Schroeder's gratuitous comment that there were already enough anti-union people in the department is revealing, not only because it tends to corroborate some of Wilbun's testimony, but also because it demonstrates the Respondent's interest in the degree of support the Union had within the department. Finally, the fact that the job posting was tailored to skills that Wilbun possessed tends to support Wilbun's testimony that he was told that the job was being created for him, even if he wasn't asked to draft his own job description.

It is undisputed that Wilbun met with Schroeder and Michael before his transfer to the unit and that they told him his BMET job was being eliminated. I also find it credible that they told Wilbun that a craftsman job was being created for him because, in fact, it was. There had not been a job posted like the one posted on May 21 and the personnel requisition form proves that this job was created specifically for Wilbun. I also find that the subject of decertification of the Union was discussed, based on Schroeder's admission that it was. I also find, based on Schroeder's admission, that Schroeder did tell Wilbun that he preferred that Wilbun not get involved in order to avoid raising any "red flags". Beyond these essentially undisputed facts, however, I am unable to credit Wilbun because of the doubts expressed above regarding his testimony. Even though Schroeder's credibility was equally questionable, it is the General Counsel who bears the burden of proof that the statements were made and that an unfair labor practice was committed. *National Telephone Directory Corp.,* 319 NLRB 420, 422 (1995). Accord: *Sea Crest Construction Corp.,* 330 NLRB 584, fn. 1 (2000). Because of the strong possibility that Wilbun's testimony regarding what Schroeder said at the meeting may have been colored by the incident which led Wilbun to resign, I can not rely upon his testimony to find a violation. The fact that Wilbun wrote his notes of the meeting after he decided to resign and gave them to the Union on his way out the door suggests that he may have had an agenda

which cast doubt on his truthfulness. Thus, I can not credit Wilbun's testimony that the Respondent, through Schroeder and Michael, told him that the job was being created so that Wilbun could assist in decertifying the Union, that they instructed him to write his own job description to prevent another employee from bidding on it, that they instructed him to solicit other employees to abandon support for the Union, that they solicited him to circulate and file a decertification petition, or that they created the impression that employees' union activities were under surveillance. Accordingly, I shall recommend that paragraph 6(a) through (e) of the complaint be dismissed.

The complaint also alleges that the Respondent altered the scope of the unit, in violation of Section 8(a)(5) and (1) of the Act, by transferring team leaders and a biomedical technician into the unit unilaterally and without the Union's consent. The complaint further alleges that the Respondent violated Section 8(a)(5) and (1) by unilaterally assigning unit work to the team leaders and biomedical technician. It is essentially undisputed that the Respondent transferred three non-unit employees, Wade Boehm, Don Sewell and Terry Wilbun, into bargaining unit positions on or about June 1 and that it did so without the Union's consent. Although the parties had discussed this issue at the bargaining table on April 11 and May 21 and 23, they were certainly not at impasse when the Respondent effected the transfer. The Union had not yet responded to the legal claims raised in Peterson's May 21 letter announcing the transfers. In any event, Peterson's letter made it clear that the Respondent intended to go ahead with the transfers regardless of the Union's position.[14] Thus, the unilateral nature of the Respondent's actions is clear.

While the evidence demonstrates that the Respondent acted unilaterally in making these transfers, the real issue is whether the transfers altered the scope of the unit or otherwise caused a change in the wages, hours and terms and conditions of unit employees. The General Counsel relies upon a line of cases in which the Board has held that, once a bargaining unit is defined by certification or agreement of the parties, it is an unfair labor practice for either party to insist on changes in the scope of the unit. See *Hampton House,* 317 NLRB 1005 (1995); *United Technologies Corp.,* 292 NLRB 248 (1989), enfd. 884 F.2d 1569 (2d Cir. 1989). See also *Bremerton Sun Publishing,* 311 NLRB 467 (1993).

All of the cases cited by the General Counsel involved attempts by employers to remove positions from an established bargaining unit by re-classifying them based on changes in technology or operational procedures. This case is factually different. Here, the Respondent did not alter the scope of the unit. The unit description remained unchanged after June 1, i.e. it still excluded team leaders and biomedical technicians. The change that occurred is that individual employees who held excluded positions were transferred into unit positions. This might alter the scope of the unit if they continued performing their non-unit duties notwithstanding the change in title. Certainly, as to Wilbun, that is General Counsel's claim and I will discuss this later. With respect to the team leaders, however, there is no evidence that they performed any duties other than bargaining unit work after their demotion. Because the team leaders had always done a substantial amount of unit work when they were team leaders, the change was not a qualitative change but a quantitative one, i.e. they were now able to do more unit work because they no longer had the administrative tasks required of a team leader. As the Respondent points out, they had always been journeymen or master craftsmen with the additional duties of a team

[14] If the Respondent truly was concerned with the unit placement of these historically excluded positions because they had undergone recent significant change, it could have filed a unit clarification petition to resolve these issues. See *Bethlehem Steel Corp.,* 329 NLRB 243 (1999), citing *Union Electric Co.,* 217 NLRB 666, 667 (1975).

leader. Because they no longer had team leader duties to perform, they simply reverted to a journeyman or master craftsman. In the absence of evidence that Boehm and Sewell continued to be team leaders after June 1, I agree with the Respondent that their demotion from team leaders to master craftsman and journeyman, respectively, did not amount to an alteration in the scope of the unit. Accordingly, I shall recommend dismissal of this aspect of the allegation in paragraph 8 of the complaint.

The complaint also alleges that the Respondent unilaterally assigned unit work to non-bargaining unit employees after the former team leaders were transferred into the bargaining unit. The facts support this allegation. Although Boehm and Sewell had always done unit work, with the apparent acquiescence of the Union, the amount of work they did increased when they were freed of responsibility as team leaders. As the Union pointed out during bargaining, any additional work should have gone to employees already in the unit, including employees on lay off with recall rights. The Respondent's decision to allow its non-unit team leaders to take unit jobs was a mandatory subject of bargaining because it related to the work assignments of unit employees and the availability of work for laid off unit employees. Although the Respondent was free to eliminate the non-unit position of team leader, it could not unilaterally assign unit positions to the individuals displaced by its decision. It is clear from Zomok's April 3 e-mail and Peterson's May 21 letter that the Respondent had no intention of bargaining about whether the former team leaders could take bargaining unit jobs. It is also clear, as Zomok conceded, that the Union never agreed to this. Thus, by unilaterally assigning unit jobs to the non-unit Team Leaders when their jobs were eliminated, the Respondent violated Section 8(a)(5) and (1) of the Act.

The Respondent's actions with respect to Wilbun's BMET position do evidence an attempt to alter the scope of the unit. When the Respondent recognized the Union in August 2000, the parties agreed to exclude BMETs from the unit, for whatever reason. When Terry Wilbun was promoted to a BMET in January 2002, he left the unit. The work he did as a BMET, on sterilizers and other biomedical equipment, clearly was non-unit work even if he had done it before when he was a craftsman. There is no evidence that any other unit employees did this type of work.[15] When the Respondent decided in 2003 to eliminate Wilbun's biomed position, they created a new craftsman position, with specialized duties exclusively related to maintenance and repair of biomedical equipment, and placed this position in the unit.[16] Although the Respondent labeled the new job a craftsman, it clearly was a biomedical job. When the Respondent created this new job as a unit job, it altered the scope of the unit. See *Hampton House,* supra (Board found employer altered scope of unit by promoting five LPNs into supervisory positions where they continued to perform the same duties). Because the Respondent acted unilaterally and without the consent of the Union, it violated Section 8(a)(5) and (1) of the Act. Alternatively, even if the unit was not altered by the Respondent's action, the assignment of biomedical equipment duties to the craftsman position constituted a unilateral change that required notice and an opportunity to bargain. Although the Respondent gave the union notice that it was transferring a biomed tech into the unit, it never bargained about the

[15] The Respondent's management recognized the anomaly of Wilbun's position in 2001 when, in his evaluation, his supervisor called Wilbun a "craftsman in a biomed world".

[16] None of the Respondent's witnesses explained why Michael's requisition to fill this new position was not put on hold. According to Zomok, the Respondent had been putting a hold on such requisitions as part of its cost-cutting plan.

creation of a new job description for craftsman.[17] By acting unilaterally in this regard, the Respondent also violated Section 8(a)(5) and (1).

The Respondent, in its brief, did not address the Section 8(a)(5) allegations under the theory advanced by the General Counsel, i.e. alteration in the scope of the unit and unilateral change. The Respondent focused instead on attempting to dispute any claim that the Respondent had transferred the two team leaders and Wilbun into the unit to undermine the union's support and to facilitate a decertification petition. The Respondent cited cases in which the Board addressed the issue of "unit packing" in the context of representation cases. See, e.g., *Sonoma Mission Inn and Spa,* 322 NLRB 898 (1997) and cases cited therein. Although the complaint alleged that Schroeder and Michael violated Section 8(a)(1) by telling Wilbun that he was being transferred into the unit to decertify the Union, the General Counsel did not allege a general unit-packing violation. I have already recommended dismissal of the Section 8(a)(1) violation based on Wilbun's testimony. I find it unnecessary to determine whether the Respondent's unlawful unilateral alteration of the unit and assignment of unit work to non-unit employees also was illegal based on the unalleged theory that the Respondent's actions were intended to undermine the Union or facilitate a decertification petition.

C. *Alleged Unilateral Change and Direct Dealing in July*

On or about July 25, the Respondent experienced a power outage in the middle of the night. According to Michael, the Respondent had experienced several outages that summer because of problems at the local utility company and problems with its own diesel generator. Although the Respondent has provided beepers to employees when it anticipated such problems so that they could be available in the event of an emergency, it did not do so on the night in question. When the power went out on July 25, Michael tried, unsuccessfully, to reach the two electricians, Boehm and Murray. Michael acknowledged being upset that neither employee answered his phone. It is undisputed that neither employee was on-call that night. The next morning, Michael spoke to Boehm and Murray individually. According to Michael, he told them that he wanted them to be on-call during the week to prevent a recurrence of the previous night's problem.[18] Michael testified that after Boehm and Murray went to see Zomok and Schroeder, respectively, he was told that it was not necessary to place them on-call during the week. By 10:00 that morning, Michael had called both Boehm and Murray back into his office and told them that he was no going to place them on-call. Schroeder corroborated Michael regarding this sequence of events. Schroeder and Michael both testified that Michael did not have the authority to institute an on-call schedule during the week because of the budgetary impact of such a move.

Murray testified for the General Counsel. According to Murray, Michael told him that, from now on, he and Boehm would carry the beeper from 5:30 PM to 6:00 AM. Murray testified that he was given the beeper to carry that night. The next morning, Michael called him into the

[17] The unilateral nature of the Respondent's actions is evident in Peterson's comment, when Myers pointed out, at the May 23 meeting, that the BMET, unlike the team leaders, was not doing unit work, that the Respondent could solve the problem by posting a job and having the BMET bid on it.

[18] Michael admitted that, in a pre-trial affidavit, he stated that he told Boehm and Murray that they "**would be** on-call"(emphasis added). In testimony eerily similar to Wilbun's, Michael claimed the Board agent had made a mistake, that what he said when he gave the affidavit was that he "**wanted to** put them on-call"(emphasis added).

office and told him that, because Boehm had complained to Zomok about it, he didn't have to carry the beeper anymore. Murray denied speaking to Schroeder or anyone other than Michael about it. Murray did tell Michael, when he was given the beeper, that he considered this to be a form of punishment. Boehm testified for the Respondent. He recalled that Michael was upset that Boehm hadn't answered his phone during the outage. When Boehm told Michael that he wasn't being paid to answer the phone, Michael told him he wanted to put him on-call for everything. Boehm testified that he went to see Zomok and asked if Michael could do this. According to Boehm, Zomok told him that Michael had the authority to put him on-call if he needed the coverage. Boehm then went back to Michael and asked him to give Boehm another chance, promising that he would answer his phone. Michael then dropped the issue of placing Boehm on-call.

The General Counsel alleges that the Respondent violated Section 8(a)(5) and (1) in two respects as a result of this incident. According to the General Counsel, the Respondent unilaterally changed employees' wages, hours and terms and conditions of employment when Michael told the employees that they would be on-call during the week. The General Counsel further alleges that the Respondent engaged in unlawful direct dealing when Michael rescinded the change after discussing it with Boehm. The Respondent argues that there was no "change", that Michael merely expressed to the employees his proposal that they go on-call to avoid a recurrence of the previous nights' problem. Michael never implemented the plan because he was told he had no authority to do this. The Respondent contends further that it did not engage in direct dealing in its conversations with Boehm and Murray because it merely responded to employees' questions and did not negotiate over any mandatory subject.

As the Respondent knows from the earlier unfair labor practice proceeding, an on-call schedule is a mandatory subject of bargaining. Thus, had the Respondent adopted such a system for covering power outages without notification to the Union, it would have violated the Act. See *Indian River Memorial Hospital,* supra. I find that the evidence in the record here does not establish that a "change" in terms and conditions ever occurred. Although Michael may have expressed his desire to place Boehm and Murray on-call, he did not do so. In this regard, I do not credit the testimony of Murray that he was given the beeper for one night. The outage occurred in the early hours of Friday morning and Murray met with Michael the same morning. The next night was a weekend and Murray would have carried the beeper anyway under the Respondent's established weekend on-call system. Because Murray displayed a somewhat foggy memory as to dates, it appears he may have confused his regular weekend on-call with a new on-call schedule. Because the General Counsel has failed to establish that a change occurred, I shall recommend dismissal of this allegation in paragraph 9 of the complaint.

The Board has held that an employer who deals directly with his unionized employees, or with anyone other than the Section 9(a) representative of those employees, regarding their wages, hours and other terms and conditions of employment, violates Section 8(a)(5) of the Act. *Allied Signal, Inc.,* 307 NLRB 752 (1992). The Board there said that direct dealing need not take the form of formal bargaining but could involve the solicitation of employees' views regarding mandatory subjects of bargaining. See also *Medo Photo Supply v. NLRB,* 321 U.S. 678, 684 (1944). In determining whether an employer has engaged in unlawful direct dealing, the Board will examine whether the employer's direct solicitation of employee sentiment over working conditions is likely to erode the Union's position as the employees' exclusive representative. *Armored Transport, Inc.,* 339 NLRB No. 50 (June 26, 2003). The Board has not found a violation where an employer did not initiate the communications with the employees but merely responded to their questions in a non-coercive way. *U.S. Ecology Corp.,* 331 NLRB 223, 226 (2000). Finally, in *Champion International Corp.,* 339 NLRB No. 80 (July 14, 2003), the

Board distinguished between a unilateral change, which does not require any communication with employees, and direct dealing, which does not require a change.

I find that the conduct here does not rise to the level of unlawful direct dealing. When Michael told Boehm that he wanted to put him and Murray on-call "for everything", Boehm went to see Zomok to inquire if Michael could do this. When Zomok indicated Michael could do so to ensure coverage, Boehm returned and asked Michael to give him another chance. As a result, no one was placed on-call. While some "negotiating" may have occurred, it was initiated by Boehm. The Respondent did not solicit Boehm or Murray for their views on whether an on-call system was necessary. This exchange was not likely to undermine the Union's status as the employees' exclusive representative because no change resulted from the communication. Accordingly, I shall recommend that this allegation in paragraph 9(c) of the complaint be dismissed.

D. *Alleged Unlawful Assistance to Employees' Decertification Efforts*

There is no dispute that, on September 12, Michael permitted five unit employees to take an extended lunch period for the purpose of visiting the Union hall. The five employees were: Chad Lane, an HVAC/IAQ Technician who filed the decertification petition in June; Boehm, the master craftsman electrician and former team leader; Louis Musacchio, a journeyman plumber, Rick Hart, another journeyman plumber; and Bill Downam, a craftsman who works primarily in the power plant. According to Michael, four or five employees came to his office that morning, angry and upset about a rumor they had heard that the unit employees would not be getting a pay upgrade because the Union was claiming it had not been negotiated. According to Michael, one of the employees told him he had called Myers and asked to meet with him and Myers said he could see them if they came now. Michael asked if the employees could wait until after work and they told him no, that Myers said he would talk to them about the issue if they came now. Michaels testified further that, after reviewing the schedule and seeing that he had nine people on duty that day, he told the employees they could go, but that they would have to punch out and use vacation time if they exceeded their half-hour lunch break. Michael also told them that they should carry their radios and would have to return immediately if he called them. Schroeder testified that Michael informed him that he had let five employees leave work to meet with the Union. Schroeder acknowledged being aware that at least one of them, Lane, had filed the decertification petition. Michael claimed to have no knowledge at the time that such a petition had even been filed, testimony I find incredible.

The Respondent's payroll records show that Lane, Hart and Musacchio punched out at 12:45 PM and punched back in at 2:00 PM. Boehm and Downam punched out at 12:30 and punched back in at 2:00 PM. The records also show that Lane used 15 minutes of vacation time, Musacchio used 45 minutes of vacation time, Downam used one hour of vacation time, while Hart and Boehm apparently used no leave during their absence. There is no dispute that the Respondent generally permits employees to extend their lunch hours or take time off during the day for doctors' appointments or to run errands, as long as they take appropriate leave. Michael admitted, however, that he had never before let five employees leave work at the same time. Michael, in an attempt to explain this departure from the norm, testified that this was "the first time he had five angry people in my office". According to Michael, he feared the situation might escalate if he did not allow the employees to meet with the Union to air their grievances.

The four employees from the group who testified as witnesses for the Respondent contradicted Michael's testimony. None of them described going to Michael's office as a group. Lane testified that he met alone with Michael. Boehm also spoke to Michael individually, telling

him that he wanted to go down and talk to the Union about why the decertification petition was being held up. Downam testified that he spoke to Michael over the phone to request time off without saying where he was going or why he wanted to leave. Musacchio simply filled out a form requesting leave and left it in his box without speaking to Michael.

There is no dispute that the employees were upset when they met with Myers. Their main complaint was that they felt the Union was preventing them from getting an upgrade in pay that apparently would have resulted from a study done by the Respondent. They also were upset that the decertification vote had been blocked by unfair labor practice charges the Union had filed. According to Lane, the employees told Myers that they wanted the decertification petition to go forward and asked the Union to stop filing unfair labor practice charges. According to Lane, Myers told him he would stop filing charges when the Respondent stopped violating the law.

The Respondent's apparent leniency in permitting these five employees to absent themselves from work for more than an hour contrasts with its treatment of employees on the Union's negotiating committee. There is no dispute that, when the parties began negotiations in 2000, the Respondent permitted up to four employees to attend negotiation sessions during the work day. In a March 7 e-mail from Zomok to Scott, the Respondent advised the Union it would no longer be able to release four employees to attend negotiations. From that point on, no more than two were permitted leave for this purpose. Schroeder explained that, after the June 2002 lay-off, because of the reduced size of the workforce in the department, the Respondent could no longer spare four employees at a time. Michael testified that, on any given day, he would have only seven to eight unit employees on duty and would not be able to ensure coverage if more than two were absent for negotiations.[19]

The General Counsel alleges that the Respondent violated Section 8(a)(1) of the Act on September 12 by allowing these five employees to leave work en masse in the middle of the day in connection with their anti-union activities. The General Counsel and the Respondent both cite cases in which the Board has held that an employer can provide no more than ministerial assistance to employees in the filing and preparation of a decertification petition. See *Harding Glass Co.,* 316 NLRB 985, 991 (1995); *Continental Nut Co.,* 195 NLRB 841, 857 (1972). Cf. *KFC Caribbean Holdings,* 341 NLRB No. 13 (January 30, 2004). The Respondent contends that the its actions here were justified by legitimate business reasons and did not constitute assistance or encouragement of the employees decertification efforts.[20]

I find that the Respondent was aware, when the employees sought permission to leave work to visit the Union hall, that these five employees were opposed to the Union. Although Michael claimed to have no knowledge that a decertification petition had been filed, he acknowledged that the employees in his office were angry at the Union over their perception that the Union was holding up a pay raise. In any event, Schroeder admitted being aware that the decertification petition had been filed at the time of this request. Zomok, the Human Resources Director, also knew that Lane had filed the petition because Lane had sought assistance from him in completing the form. Apparently everybody but Michael knew that the decertification petition was pending. Moreover, Boehm's testimony that he told Michael that the

[19] I shall hereby grant the Respondent's unopposed motion to correct the transcript of Michael's testimony, at page 75, line 11, from "seventy-eight" to "7 to 8".

[20] The decertification petition was filed by Lane in late June. There is no claim, nor evidence, that the Respondent provided unlawful assistance or encouragement to Lane in the preparation or circulation of that petition.

purpose of the group's visit to the Union hall was to try to get a vote on the Union undermines the credibility of Michael's claimed ignorance. I also note that the testimony of the employee witnesses establishes that it was common knowledge that Boehm was against the Union. The question raised by the pleadings is whether this grant of permission amounted to unlawful assistance.

The fact that the Respondent permitted these five employees to leave in the middle of the workday under the circumstances known to it at the time, while refusing to permit more than two employees to leave to assist the Union at negotiations, convinces me that the Respondent has rendered more than ministerial assistance to employees involved in the effort to decertify the Union. Michael's claim that he could excuse five employees because he had nine on duty that day is unpersuasive. Whether the Respondent is short five out of nine employees, or four out of eight doesn't appear to make much difference. Moreover, the Respondent imposed a blanket limit on the number of employees who could be absent to assist the Union, without regard to the staffing needs of any particular day. The Respondent could have advised the Union that the number of employees it would release would depend on its needs at the time of the request. In addition, the Respondent could have addressed its concerns about coverage by imposing the same condition on the release of union supporters as it did on the anti-union group, i.e. they would have to carry their radios and beepers and return to the hospital if needed. The Respondent's apparent eagerness to accommodate the wishes of its anti-union employees, in the face of the restrictions imposed on union supporters is the kind of unlawful encouragement that the Board would find unlawful.

I do not credit Michael's testimony that he granted the employees' request on September 12 out of concern that the situation could escalate because the employees were angry. As noted, the employees in fact did not visit him as a group but made individual requests. Even assuming an angry mob was in Michael's office, he could just as easily have defused the situation by allowing two of them, rather than the whole group, to leave for a meeting with the Union. Michael's willingness to let this angry mob proceed en masse to the Union hall reveals the Respondent's interest in helping the employees rid themselves of the Union by putting pressure on the Union to accede to their demands. Accordingly, I find that the Respondent violated Section 8(a)(1) of the Act as alleged in paragraph 7 of the complaint.

Conclusions of Law

1. By allowing a group of anti-union employees to leave work en masse in pursuit of their decertification efforts on September 12, 2003, the Respondent has rendered unlawful assistance and has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. By transferring a non-unit Biomedical Equipment Technician I into the bargaining unit, effective June 1, 2001, the Respondent has unilaterally altered the scope of the recognized bargaining unit without the consent of the Union, thereby failing and refusing to bargain in good faith with the Union, and has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a) (1) and (5) and Section 2(6) and (7) of the Act.

3. By unilaterally assigning unit work to former non-unit Team Leaders, on and after June 1, 2003, without affording the Union notice and an opportunity to bargain about this change, the Respondent has failed and refused to bargain in good faith and has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

4. The Respondent has not violated Section 8(a)(1), (5) or any other provision of the Act with respect to the remaining allegations of the complaint.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. I shall recommend that the Respondent restore the status quo ante by removing the Biomedical Equipment Technician I from the unit and by removing bargaining unit work from the former team leaders. I shall recommend that the Respondent be ordered to bargain in good faith with the Union regarding the assignment of the unit work which becomes available as a result of the Respondent's elimination of the Team Leader position. The record does not indicate what the Respondent did with the work previously done by BMET I Wilbun after his resignation on September 1. If the Respondent has not already done so, the non-unit work Wilbun had been doing between June 1 and September 1, 2003 should be removed from the bargaining unit.

The General Counsel has requested a broad order because the Respondent has already been found to have violated Section 8(a)(1) and (5) of the Act in the first *Indian River Memorial Hospital* case. Because of the passage of time between the earlier unfair labor practices and the unlawful conduct in this case, I find it unnecessary to issue a broad Order requiring the Respondent to cease and desist from infringing in any other manner on rights guaranteed employees by Section 7 of the Act. *Hickmott Foods*, 242 NLRB 1357 (1979). Although the violations are similar, I do not believe they evidence a proclivity to violate the Act, particularly where the violations may have resulted from a misunderstanding of the Respondent's obligations under the Act. Accordingly, I shall decline the General Counsel's request for a broad order.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[21]

ORDER

The Respondent, Indian River Memorial Hospital, Vero Beach, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Rendering unlawful assistance to employees in the pursuit of their efforts to decertify International Brotherhood of Teamsters, Local 769, AFL-CIO ("the Union").

(b) Altering the scope of the recognized bargaining unit without the consent of the Union.

(c) Unilaterally changing unit employees' wages, hours and terms and conditions of employment by assigning unit work to non-unit employees without affording the Union advance notice and an opportunity to bargain regarding any such changes.

[21] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time Stationary Engineers, Journeymen, Master Craftsmen, Craftsmen and Groundskeepers employed by the Respondent at its Vero Beach, Florida facility; but excluding all Team Leaders, Senior Groundskeepers, CAD Operators, Engineering Data Management Coordinators, Biomedical Equipment Technicians I, II and III, Office Coordinators, or all other employees, guards and supervisors as defined in the Act.

(b) Remove the Biomedical Equipment Technician I, and any work assigned to that employee, from the Unit.

(c) Within 14 days after service by the Region, post at its facility in Vero Beach, Florida copies of the attached Notice marked "Appendix."[22] Copies of the Notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where Notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the Notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the Notice to all current employees and former employees employed by the Respondent at any time since June 1, 2003.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C.

Michael A. Marcionese
Administrative Law Judge

[22] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT render unlawful assistance to any of you who are attempting to decertify International Brotherhood of Teamsters, Local 769, AFL-CIO ("the Union") as your exclusive collective-bargaining representative.

WE WILL NOT alter the scope of the previously recognized bargaining unit by transferring non-unit employees into bargaining unit positions.

WE WILL NOT unilaterally change your wages, hours and other terms and conditions of employment by assigning unit work to non-unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

All full-time and regular part-time Stationary Engineers, Journeymen, Master Craftsmen, Craftsmen and Groundskeepers employed by the Respondent at its Vero Beach, Florida facility; but excluding all Team Leaders, Senior Groundskeepers, CAD Operators, Engineering Data Management Coordinators, Biomedical Equipment Technicians I, II and III, Office Coordinators, or all other employees, guards and supervisors as defined in the Act.

WE WILL remove from the above bargaining unit the Biomedical Equipment Technician I position that was unilaterally transferred into the Unit on June 1, 2003.

INDIAN RIVER MEMORIAL HOSPITAL
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

201 East Kennedy Boulevard, South Trust Plaza, Suite 530, Tampa, FL 33602-5824

(813) 228-2641, Hours: 8 a.m. to 4:30 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (813) 228-2662.